IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

UNITED STATES OF AMERICA	)	
	)	
v.	)	Criminal No. 01-455-A
	)	
ZACARIAS MOUSSAOUI	)	

MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR ACCESS BY DEFENDANT TO CLASSIFIED AND SENSITIVE DISCOVERY AND FOR RELIEF FROM SPECIAL ADMINISTRATIVE MEASURES CONCERNING CONFINEMENT

This Memorandum of Law is submitted in support of the Motion for Access by Defendant to Classified and Sensitive Discovery and for Relief from Special Administrative Measures Concerning Confinement. The Motion requests that, if Mr. Moussaoui is granted his request to waive his right to counsel and to proceed *pro se*, that he also be granted access to classified and sensitive discovery information and limited relief from the Special Administrative Measures ("SAM") that govern the conditions of his confinement. This relief would be necessary in that instance to protect Mr. Moussaoui's other rights under the Fifth, Sixth and Eighth Amendments.

INTRODUCTION

In this case, a combination of restrictions unilaterally imposed by the government make it impossible for Mr. Moussaoui, acting *pro se*, to defend himself without some relief. First, the SAM cuts him off from the outside world. Second, denial of access to two significant bodies of discovery information—that which is sensitive and that which is classified—cuts Mr. Moussaoui off in a *pro se* capacity from access to evidence to be used against him and evidence that may exculpate him. To protect both Mr. Moussaoui's Sixth Amendment *Faretta* right to waive counsel and proceed *pro se* and his right to a fair trial, the Court must grant relief from the SAM so that Mr. Moussaoui can

contact the outside world and must grant Mr. Moussaoui access to the sensitive and classified discovery information.[1]

BACKGROUND

Mr. Moussaoui was indicted by a grand jury of this Court on December 11, 2001 on six (6) charges, four of which carry the death penalty.[2] At arraignment on January 2, 2002, the case was set for trial outside the time required by the Speedy Trial Act, 18 U.S.C. §§ 3161-3174, because it was certified as "complex." This certification was in part due to the government's anticipation that a part of the discovery material in the case was classified information.[3] Accordingly, the Court scheduled hearings under the Classified Information Procedures Act (hereinafter "CIPA"), 18 U.S.C. app. III, and entered a protective order that, *inter alia*, required all members of the defense team to obtain security clearances before acquiring access to classified information. The government has advised counsel on several occasions that Mr. Moussaoui will not be cleared under any circumstances to see any classified information.

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[1] On April 22, 2002, Mr. Moussaoui moved the Court for leave to proceed *pro se*. When a defendant seeks to waive counsel and proceed *pro se*, it is often said that he is seeking to "exercise his *Faretta* right." *See Faretta v. California*, 422 U.S. 806 (1975) (Sixth Amendment guarantees right to self-representation).

The right to counsel is so fundamental to the protection of other rights that the Fourth Circuit has said that a trial court should "'indulge in every reasonable presumption against [its] waiver.'" *Fields v. Murray*, 49 F.3d 1024, 1029 (4th Cir.) (en banc) (citation omitted) (alteration in original), *cert. denied sub nom., Fields v. Angelone*, 516 U.S. 884 (1995). It is those "other rights" about which we are concerned here.

[2] Conspiracy to Commit Acts of Terrorism Transcending National Boundaries (18 U.S.C. §§ 2332b(a)(2) and (c) (Count One)); Conspiracy to Commit Aircraft Piracy (49 U.S.C. §§ 46502(a)(1)(A) and (a)(2)(B) (Count Two)); Conspiracy to Destroy Aircraft (18 U.S.C. §§ 32(a)(7) and 34) (Count Three)); Conspiracy to Use Weapons of Mass Destruction (18 U.S.C. § 2332a(a) (Count Four)); Conspiracy to Murder United States Employees (18 U.S.C. §§ 1114 and 1117) (Count Five)); and Conspiracy to Destroy Property (18 U.S.C. §§ 844(f), (i), (n) (Count Six)).

[3] *See* Joint Motion to Certify Case as "Complex" and to Set Forth Schedule Regarding Death Penalty Notice and the Court's Order of December 27, 2001.

As of the date of filing this Motion, the *Moussaoui* Secure Classified Information Facility ("SCIF") contains an enormous amount of discovery. If Mr. Moussaoui started reading today, he would likely be unable to finish reading it by the day of trial even if that is all he did. Much of it is in a foreign language and will have to be translated by cleared translators.

On January 7, 2002, counsel received notice as to the terms of the SAM that would govern Mr. Moussaoui's pre-trial confinement. Those conditions are harsh, literally unprecedented, and have been the subject of prior litigation in this Court. The SAM, of course, presume that Mr. Moussaoui will be represented by cleared (from a standpoint of access to classified information) counsel who would be responsible for the investigation of the case, including the review and analysis of classified information and representation of Mr. Moussaoui's interests at any CIPA proceeding. The SAM prohibits Mr. Moussaoui from communication of any sort with any person who has not been cleared by the government as a member of his defense team or who is a member of his immediate family. (SAM 4.) He is precluded from using the telephone to locate and hire his own attorney to assist him with his defense or to locate experts and witnesses himself. (SAM 2.h.) Outgoing mail is limited to counsel, the Court and his immediate family—incoming mail is delivered to his counsel after inspection by the FBI. Of course, Mr. Moussaoui cannot leave the jail to investigate anything on his own.

On January 22, 2002, the Court entered a Protective Order that divided the non-classified discovery information in the case into two categories—"general" and "sensitive." After Mr. Moussaoui sought leave of Court to proceed *pro se* on April 22, 2002, the government requested that sensitive discovery information not be provided to Mr. Moussaoui until Mr. Moussaoui's motion to proceed *pro se* was resolved. It is not clear what the government's intentions are with regard to

the sensitive discovery information in the event Mr. Moussaoui's motion to proceed *pro se* is granted. The volume of sensitive discovery information is such that it will take several people to read it between now and trial if that is all that they did.

The government began delivery of substantial amounts of classified information to defense counsel on June 1, 2002 in accordance with the Court's Order of January 2, 2002, which required delivery by June 1, 2002. The government is still in the process of delivering this information.

ARGUMENT

I. MR. MOUSSAOUI CANNOT WAIVE THE RIGHT TO A FAIR TRIAL

In this case, the government has imposed restrictions on the defendant's access to discovery information by classifying and/or labeling it as "sensitive" and has also imposed restrictions on the defendant's ability to communicate with the outside world. Counsel can find no precedent in case law where a defendant has asked for and been granted the right to proceed *pro se*, but has been restricted in that endeavor as the government would restrict the defendant here.

Access to classified information, sensitive discovery information, and relaxation of the restrictions of the SAM are therefore required if Mr. Moussaoui's motion to proceed *pro se* is granted. Otherwise, Mr. Moussaoui's waiver of counsel will become the effective equivalent of a waiver of his right to a fair trial. *See United States v. Farhad*, 190 F.3d 1097, 1101 (9th Cir. 1999) (Reinhardt, J., concurring specially). Unlike *Farhad*, the chances of a fair trial here with Mr. Moussaoui acting *pro se* are not merely "remote," they do not exist without the relief requested herein.

The Fourth Circuit has held that "the *Faretta* right to self-representation is not absolute, and 'the government's interest in ensuring the integrity and efficiency of the trial at times outweighs the

defendant's interest in acting as his own lawyer.'" *United States v. Frazier El*, 204 F.3d 553, 559 (4th Cir.), *cert. denied*, 531 U.S. 994 (2000) (quoting *Martinez v. Court of Appeals of Cal.*, 528 U.S. 152, 162 (2000)). Here, the Court must weigh the governmental interests in preventing Mr. Moussaoui from communicating with persons necessary for the preparation of his defense (currently precluded by the SAM) and in denying Mr. Moussaoui access to certain discovery information (by classifying it) against Mr. Moussaoui's attempt to exercise his *Faretta* right. If the right to proceed *pro se* is granted, then Mr. Moussaoui must be granted relief from these government imposed restrictions.

It is one thing for an appellate court to look retrospectively at a "train wreck" of a trial that has occurred after a defendant has decided to represent himself into ultimate disaster and to excuse what occurred because the defendant opted to represent himself. It is quite another for a trial judge, who can prospectively see a "train wreck" coming (even if the *pro* se defendant were to turn out to be an outstanding lawyer) because of government limitations on the defendant's ability to represent himself, to allow self-representation to proceed without also removing those limitations. *See* Martin Sabelli & Stacey Leyton, *Train Wrecks and Freeway Crashes: An Argument for Fairness and Against Self Representation in the Criminal Justice System*, 91 J. Crim. L. & Criminology 161 (2000). Here, the Court has a duty to avoid the inevitable "train wreck" that will ensue, caused not by the defendant's probable inability to understand the fine points of presenting his own defense, but instead by barriers put in place by the government that prevent the defendant, even if he were himself a highly-skilled attorney, from successfully defending himself *pro se*.[4] This is especially true given

[4] Counsel doubt that the effect of the waiver of counsel on the ability to get a fair trial in the circumstances of this case could ever be satisfactorily explained to Mr. Moussaoui by the district judge, who has not (continued...)

that Mr. Moussaoui faces the death penalty and, therefore, raises additional concerns under the Eighth Amendment because a substantial amount of mitigation evidence is classified. Accordingly, if Mr. Moussaoui is allowed to proceed *pro se*, he must also be freed from conditions of the SAM that shut him off from the outside world, he must be granted access to both sensitive and classified discovery information, and he must be given time to review it.

II. FIFTH AMENDMENT RIGHTS

Denying Mr. Moussaoui, as a *pro se* defendant, access to the outside world and access to classified information deprives him of his non-waivable rights under the Fifth Amendment to (a) receive exculpatory evidence, and (b) present a defense.

A. Due Process Right to Exculpatory Evidence (*Brady*)

In this case a significant amount of classified information has already been placed in the SCIF that is potentially relevant and material to either the government's case or the defense's case and thus necessary to the preparation of the defense. (It would not be in the SCIF if it was not one or the other.) We understand the Court also is reviewing additional materials for placement in the SCIF and counsel understand that much more is yet to be delivered. Mr. Moussaoui has not only not seen this information, but without the relief requested herein, he never will. This raises the question as to whether Mr. Moussaoui can knowingly and voluntarily waive the right to see that which he has not seen.

One of the key rights that Mr. Moussaoui will be required to waive if his motion to proceed *pro se* is granted and the relief requested herein is not, is his right, guaranteed by *Brady v. Maryland*,

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[4] (...continued)
examined the discovery material, so that any waiver would not be knowing and voluntary.

373 U.S. 83 (1963), to see any exculpatory evidence contained in the sensitive and classified discovery information. The Supreme Court has decided many cases involving the waiver of constitutional rights. For example, in *United States v. Mezzanatto*, 513 U.S. 196 (1995), the Court held that a defendant could knowingly and intelligently waive his right to exclude evidence provided to the government in plea negotiations. However, the Court noted that there are limits on what can be waived:

> There may be some evidentiary provisions that are so fundamental to the reliability of the factfinding process that they may never be waived without irreparably "discredit[ing] the federal court." See 21 Wright & Graham § 5039, at 207-208; see also *Wheat v. United States*, 486 U.S. 153, 162, 108 S. Ct. 1692, 1698-1699, 100 L.Ed.2d 140 (1988) (court may decline a defendant's waiver of his right to conflict-free counsel); *United States v. Josefik*, 753 F.2d 585, 588 (CA7 1985) ("No doubt there are limits to waiver; if the parties stipulated to trial by 12 orangutans the defendant's conviction would be invalid notwithstanding his consent, because some minimum of civilized procedure is required by community feeling regardless of what the defendant wants or is willing to accept").

Id. at 204.

The Fourth Circuit has observed that other circuits have held that a defendant, in pleading guilty, cannot waive the right to review *Brady* material and that when a defendant has elected to plead guilty in the absence of *Brady* material, that conviction can be reversed if the withheld information was "'controlling in the decision whether to plead.'" *United States v. McCleary*, 1997 U.S. App. LEXIS 9391, at *11 (4th Cir. 1997) (unpublished opinion, copy attached) (but deciding the case on other grounds without reaching the *Brady* issue) (quoting *White v. United States*, 858 F.2d 416, 424 (8th Cir. 1988)). *See also United States v. Ruiz*, 241 F.3d 1157 (9th Cir. 2001) (holding that the right to receive *Brady* material cannot be waived in a plea agreement), *cert.*

granted, 122 S. Ct. 803 (Jan. 4, 2002) (No. 01-595). An even more drastic issue is raised here, *i.e.*, whether a defendant who goes to trial can waive *Brady*. While it may be debatable as to whether *Brady* may knowingly and intelligently be waived in a guilty plea context, it certainly cannot be waived by a defendant proceeding to trial.

The government might suggest that cleared standby counsel could perform any function requiring access to classified information and that Mr. Moussaoui does not have to see this information himself. But this would make a sham of the *Faretta* right. The right to waive counsel and represent oneself means nothing if former counsel, and not the *pro se* litigant who will be trying the case, is the only one allowed to see important evidence. And while the rationale that the defendant himself need not see it if counsel does has been advanced by the government before, *see, e.g.*, *United States v. Usama Bin Laden*, 2001 U.S. Dist. LEXIS 719, at *20-21 (S.D.N.Y. Jan. 25, 2001), the defendants in that case were not *pro se*. We are unaware of any case involving classified information where a non-cleared defendant was allowed to proceed *pro se*.

B. Due Process Right to Present a Defense

The presence of significant amounts of discovery information in the case, both sensitive and classified, that Mr. Moussaoui cannot see and the conditions of the SAM would also deny Mr. Moussaoui his Due Process right to present his defense. *See California v. Trombetta*, 467 U.S. 479, 485 (1984) (noting that the Supreme Court has "long interpreted [the] standard of fairness [under the Due Process Clause] to require that criminal defendants be afforded a meaningful opportunity to present a complete defense"). Indeed, as the Court in *Trombetta* explained, "[t]o safeguard that right, the Court has developed 'what might loosely be called the area of constitutionally guaranteed access to evidence.'" *Id.* (quoting *United States v. Valenzuela-Bernal*,

458 U.S. 858, 867 (1982)). This right of access to evidence is not limited to trial evidence, but generally includes the right to review items which have been produced in discovery. *See United States v. Truong Dinh Hung*, 667 F.2d 1105, 1108 (4th Cir. 1981). Although in *Truong* the court did limit the defendant's access to certain material when making Jencks Act determinations, this was deemed permissible because counsel acting for the defendant were permitted to examine the documents. Here, access cannot be denied the *pro se* litigant on the basis that his counsel can see the material because he will have no counsel but himself. A defendant's waiver of his right to counsel under *Faretta* cannot carry as a condition that he also waive his right to have access to evidence.

Further, without relief from the SAM, limitations on Mr. Moussaoui's access to evidence as a *pro se* litigant would stem not only from his inability to see certain discovery, but also from his inability to investigate and prepare his case through communications with potential witnesses and experts. There is a total embargo on communications with third parties imposed by the SAM.[5]

The government is not hamstrung by these limitations. It has full access to the classified information and can endeavor to talk to or consult any witness it wants. This inequity denies Mr. Moussaoui due process in his capacity as a *pro se* litigant. In *Wardius v. Oregon*, the Supreme Court pointed out that it has repeatedly invalidated "rules which provide nonreciprocal benefits to the [government] when the lack of reciprocity interferes with the defendant's ability to secure a fair trial." 412 U.S. 470, 474 n.6 (1973) (citing *Washington v. Texas*, 388 U.S. 14, 22 (1967)

[5] We recognize that a decision of a pre-trial detainee to represent himself does not mean that he walks free so that he can interview witnesses. But here, the SAM limitations for the *pro se* defendant are unprecedented and totally preclude any such activity even by phone.

(overturning state statute barring principals, accomplices, and accessories from testifying for each other, but permitting them to testify for the prosecution)).[6]

It is no answer to say that Mr. Moussaoui brings all of this onto himself when he asks to proceed *pro se* because to so suggest is to say that the price of exercising the constitutional right recognized in *Faretta* is that one must necessarily waive other constitutional rights. No defendant should be put to such a choice. This problem is simply not cured by sprinkling the "holy water" of a finding that the waiver of the right to counsel is "knowing and voluntary" if the consequences of that choice necessarily means the waiver of other constitutional rights, some of which, like the access to *Brady* material in a trial setting, are non-waivable. If the defendant is permitted to proceed *pro se*, the defendant acting as his own lawyer must be given access to sensitive discovery, classified discovery (the government has the power to declassify), and to the outside world (the government has the power to ease the SAM restrictions).

This is not a case where the *pro se* defendant who is a pretrial detainee merely has a more difficult time preparing his defense than would be the case if he were relying on counsel or was out on bond. In such cases, the waiver of counsel made with eyes wide open constitutes a knowing and voluntary acceptance of these difficulties. But here, the price to Mr. Moussaoui of proceeding *pro se* without the relief requested is to operate with "eyes wide shut." Gaining access to evidence is not merely more difficult, it is impossible.

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[6] Indeed, the need for balance is reflected by statute, which requires that Mr. Moussaoui be able to "make any proof that he can produce by lawful witnesses, and shall have the like process of the court to compel his witnesses to appear at trial, as is usually granted to compel witnesses on behalf of the prosecution." 18 U.S.C. § 3005.

Thus, by virtue of its unreviewable authority to classify information,[7] and its ability to restrict Mr. Moussaoui's access to the outside world through the SAM, the government totally controls and trumps Mr. Moussaoui's ability to present a *pro se* defense, turning his Sixth Amendment waiver of the right to counsel into a Fifth Amendment due process waiver as well.

III. SIXTH AMENDMENT RIGHTS

The SAM and the denial of access to classified discovery information also deprive Mr. Moussaoui of his additional rights under the Sixth Amendment, *i.e.*, the rights to (a) confront witnesses and evidence, (b) be present at critical stages of the proceedings, and (c) have the assistance of counsel of one's own choosing.

A. Right to Confront Witnesses

The Sixth Amendment not only provides Mr. Moussaoui the right to cross-examine witnesses who testify against him, but it also affords him "'the opportunity for effective cross-examination.'" *Delaware v. Van Arsdall*, 475 U.S. 673, 678 (1986) (quoting *Davis v. Alaska*, 415 U.S. 308, 315 (1974)). Here, the government's denial of the *pro se* defendant's access to sensitive and classified discovery information creates an exclusive storehouse of evidence. The government alone will decide how to stock it and it alone will have access. This not only creates the kind of imbalance prohibited by *Wardius v. Oregon*, 412 U.S. 470 (1973), it also precludes the *pro se* defendant from

[7] It is widely recognized that "the Federal Government exhibits a proclivity for over-classification of information . . . ." *Ray v. Turner*, 587 F.2d 1187, 1209 (D.C. Cir. 1978) (Wright, J. concurring) (quoting former Sen. Baker). The defense "cannot challenge this classification. A court cannot question it." *United States v. Smith*, 750 F.2d 1215, 1217 (4th Cir. 1984), *rev'd on other grounds*, 780 F.2d 1102 (4th Cir. 1985) (en banc). *See also United States v. Collins*, 720 F.2d 1195, 1198 n.2 (11th Cir. 1983) ("[i]t is an Executive function to classify information, not a judicial one"). While the government classifies material in this case with one hand, it is leaked to the press (not by the prosecution in the Eastern District of Virginia) with the other as an institutional "food fight" between the C.I.A., F.B.I., and Congress is played out through a series of devastating and prejudicial media leaks.

using a large body of material in his preparation for an effective cross-examination of government witnesses.

In addition to the denial of access to an exclusive storehouse of information available only to the government, the SAM make it not just more difficult, but impossible to locate and interview government witnesses in advance of trial in order to prepare an effective cross-examination of them. Again, it is the practical impossibility created by the government's classification of discovery information and restrictions of the SAM, not just the enhanced difficulty inherent in being detained pre-trial, that require the relief requested here in order to protect the constitutional rights of the defendant if he is permitted to proceed *pro se*. Mr. Moussaoui cannot be required to waive one bundle of constitutional rights in order to exercise another.

B. Opportunity to be Present at Critical Stages of the Proceedings

In order to protect classified information from unnecessary disclosure at trial, this Court has scheduled CIPA hearings.[8] Although courts have held that a defendant does not necessarily have the right to be present at a CIPA hearing or at proceedings analogous thereto, these cases do not establish that such presence can be denied, consistent with the Sixth Amendment, when the defendant is proceeding *pro se*.

The defendant has a Sixth Amendment right to be present in his own person whenever his presence has a relation, reasonably substantial, to his ability to defend himself. *Snyder v. Massachusetts*, 291 U.S. 97, 105-06 (1934). When a defendant is acting *pro se*, this right necessarily

[8] CIPA was a response to the problem of graymail, *i.e.*, a threat from a defendant to disclose classified information during a trial, forcing the government to choose between tolerating the disclosure or dismissing the case. *See United States v. Usama Bin Laden*, 2001 U.S. Dist. LEXIS 719, at *3-4 (S.D.N.Y. 2001) and cases cited therein. It was never intended as a procedure by which the defendant would be denied access to otherwise discoverable information.

applies even to those pre-trial situations where only questions of law are being addressed. Further, Mr. Moussaoui's presence at CIPA proceedings alone is insufficient if he is not given access to the classified information so that he can meaningfully participate in such proceedings.

C. Right to Counsel

While declaring that he wants to represent himself, the defendant has also said that he wants a Muslim attorney who he will himself select and retain to advise him on matters of procedure. To the extent that his attempted waiver of the right to counsel is not ineffective as equivocal because he is still reaching out for counsel, and to the extent that any right to the assistance of counsel has not been waived by his *Faretta* assertion, the SAM totally preclude Mr. Moussaoui from exercising any residual Sixth Amendment right to counsel that he may have. This is because the SAM limit Mr. Moussaoui's ability to search for a lawyer on his own.[9]

CONCLUSION

For the reasons set forth above, it is respectfully submitted that if the Court accepts Mr. Moussaoui's waiver of the right to counsel and grants Mr. Moussaoui's motion to proceed *pro se*, it should at the same time require relief as to the SAM so as to permit Mr. Moussaoui the opportunity to use the telephone to contact third parties and to entertain visits from potential witnesses in order to prepare his *pro se* defense. The Court should also require that all discovery

[9] The government has permitted, at defense counsel's request, several Muslim attorneys to be added to the list of counsel cleared to see Mr. Moussaoui. But, this process will not work if Mr. Moussaoui is granted *pro se* status such that current counsel no longer act for him.

information, including sensitive and classified discovery information, be made available to the defendant. This relief is especially required given that this is a capital case and "death is different."[10]

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Memorandum of Law in Support of Motion for Access by Defendant to Classified and Sensitive Discovery and for Relief from Special Administrative Measures Concerning Confinement was served by hand upon AUSA Robert A. Spencer, AUSA David J. Novak, and AUSA Kenneth M. Karas, U.S. Attorney's Office, 2100 Jamieson Avenue, Alexandria, Virginia 22314 this 7th day of June, 2002.

/S/
Frank W. Dunham, Jr.

[10] *Ford v. Wainwright*, 477 U.S. 399, 411 (1986) ("In capital proceedings generally, this Court has demanded that factfinding procedures aspire to a heightened standard of reliability . . . . This special concern is a natural consequence of the knowledge that execution is the most irremediable and unfathomable of penalties; that death is different.") (Marshall, J., plurality opinion) (citations omitted).

LEXSEE 1997 US App LEXIS 9391

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. RICHARD R. MCCLEARY, Defendant-Appellant.

No. 95-6922

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

1997 U.S. App. LEXIS 9391

March 3, 1997, Argued

May 1, 1997, Decided

NOTICE:
[*1] RULES OF THE FOURTH CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

SUBSEQUENT HISTORY:
Reported in Table Case Format at: *112 F.3d 511, 1997 U.S. App. LEXIS 14311.*

PRIOR HISTORY:
Appeal from the United States District Court for the District of Maryland, at Baltimore. Walter E. Black, Senior District Judge. (CR-90-425-B, CA-95-406-B).

DISPOSITION:
AFFIRMED.

COUNSEL:
ARGUED: Christine M. Gregorski, Third Year Law Student, Appellate Litigation Clinic, UNIVERSITY OF VIRGINIA SCHOOL OF LAW, Charlottesville, Virginia, for Appellant.

Susan Moss Ringler, Assistant United States Attorney, Baltimore, Maryland, for Appellee.

ON BRIEF: Neal L. Walters, Supervising Attorney, Jill T. Crawley, Third Year Law Student, Appellate Litigation Clinic, UNIVERSITY OF VIRGINIA SCHOOL OF LAW, Charlottesville, Virginia, for Appellant.

Lynne A. Battaglia, United States Attorney, Baltimore, Maryland, for Appellee.

JUDGES:
Before WILLIAMS and MICHAEL, Circuit Judges, and GOODWIN, United States District Judge for the Southern District of West Virginia, sitting by designation.

OPINION:

PER CURIAM:

In 1991, Richard McCleary pleaded guilty to conspiracy to launder drug proceeds, see *18 U.S.C.A. § 371* (West Supp. 1997), **[*2]** and was sentenced to five years in prison. Almost four years later, McCleary filed a motion, pursuant to *28 U.S.C.A. § 2255* (West Supp. 1997), seeking to set aside his guilty plea and sentence. McCleary argues that the Government's presentation of perjured testimony and its failure to produce impeachment and exculpatory evidence materially affected his decision to plead guilty. We conclude, albeit for reasons different from those stated by the district court, n1 that McCleary cannot, as a matter of law, collaterally attack his guilty plea.

n1 See *Shafer v. Preston Memorial Hosp. Corp., 107 F.3d 274, 275 n.1 (4th Cir. 1997)* (noting that "we have consistently recognized that we may affirm a district court's decision on different grounds than those employed by the district court").

I.

On October 31, 1990, McCleary, a law school graduate, and his wife, Suzanne McCleary, were charged in a fifteen-count indictment with conspiracy to launder drug proceeds. See *18 U.S.C.A. § 371* (West Supp. 1997). McCleary **[*3]** was also charged with laundering drug proceeds, see *18 U.S.C.A. § 1956* (West Supp. 1997); structuring currency transactions, see *31 U.S.C.A. § § 5324*(a)(3) & 5322(a) (West Supp. 1997); failing to file currency transaction reports, see *31 U.S.C.A. § § 5316*(a)(1)(A) (West 1983 & Supp. 1997) & 5322 (West Supp. 1997); and aiding and abetting, see *18 U.S.C.A. § 2* (West Supp. 1997). At his arraignment, McCleary entered a plea of not guilty on all counts. As a result, the case against McCleary proceeded to trial.

On May 21, 1991, Suzanne McCleary entered into a cooperation agreement with the Government in which she agreed to testify against her husband. The following day, McCleary's trial began. The Government's first three witnesses were Hans Pfennings, Donald Mackessy, and Archie Elliott. Both Elliott and Mackessy testified, pursuant to plea agreements, that they had purchased cocaine from McCleary between 1984 and 1988. Pfennings, who testified that he was not a paid agent of the United States Government, told the jury that McCleary frequently transferred money in and out of the off-shore trust accounts that Pfennings managed.

After the testimony of these three witnesses, **[*4]** and prior to the testimony of his wife, McCleary decided to enter into a plea agreement with the Government. Under the terms of the agreement, McCleary would plead guilty to one count of money laundering, and the Government would recommend a sentence at the low end of the Sentencing Guidelines range. Subsequent to the entry of McCleary's plea, the Government realized that the conduct in the count to which McCleary pleaded guilty occurred prior to the enactment of the Sentencing Guidelines. As a result, the Government advised McCleary and the court that it would file a motion to nullify or rescind the plea agreement.

After changing counsel, McCleary entered into a new plea agreement with the Government. Under the terms of the new agreement, McCleary would plead guilty to one count of conspiracy to launder drug proceeds, and the Government would recommend a maximum five-year sentence, to run consecutive to the 25-year state sentence McCleary was then serving for selling narcotics. At his rearraignment, McCleary withdrew his first guilty plea to money laundering and entered a second plea of guilty to conspiracy to launder drug proceeds. In addition, McCleary stipulated to and signed **[*5]** a Statement of Facts in which he admitted his involvement in (1) selling drugs; (2) laundering drug proceeds; (3) structuring currency transactions; and (4) failing to file currency transaction reports. The district court accepted McCleary's plea and the Government's sentencing recommendation.

Almost four years after he was sentenced, McCleary filed a motion, pursuant to *28 U.S.C.A. § 2255* (West Supp. 1997), to vacate and set aside his guilty plea and sentence. n2 McCleary argues that the Government's presentation of perjured testimony and its failure to produce impeachment and exculpatory evidence materially affected his decision to plead guilty. Specifically, McCleary alleges that he has evidence (1) that Pfennings, who testified that he was not a paid agent of the United States Government, had actually been a paid federal agent for the DEA for six months prior to McCleary's trial; (2) that Special Agent Robert Twigg purchased prescription Valium for Elliott during at least one debriefing session; and (3) that the Government possessed tape recordings of exculpatory telephone conversations. Moreover, McCleary asserts that the prosecuting attorney knew, prior to his plea, that Pfennings **[*6]** perjured himself, that Elliott was addicted to Valium, and that exculpatory tape recordings existed.

> n2 Because McCleary's sentence was to run consecutive to the state narcotics sentence he was serving at the time he entered his plea, he had not yet begun serving his five-year sentence when he filed his § 2255 motion.

The district court held, however, that McCleary's allegations of prosecutorial misconduct did not provide a basis for setting aside his guilty plea. The court reasoned that all of McCleary's allegations related to errors which occurred prior to his admitting in court that he was, in fact, guilty of the crime charged. (J.A. at 176-77 (citing *Tollett v. Henderson, 411 U.S. 258, 267, 36 L. Ed. 2d 235, 93 S. Ct. 1602 (1973)* (noting that a defendant may not "raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea")).) According to the district court, "once a criminal defendant has pled guilty, collateral review is limited to an examination of whether the plea **[*7]** was counseled and voluntary." (J.A. at 177 (citing *United States v. Broce, 488 U.S. 563, 569, 102 L. Ed. 2d 927, 109 S. Ct. 757 (1989)).)* Based on this analysis, the district court held that McCleary could not, as a matter of law, collaterally attack his guilty plea. This appeal followed.

II.

On appeal, McCleary contends that the district court erred when it held that his guilty plea barred collateral review of his claims of prosecutorial misconduct. Although McCleary agrees with the district court's conclusion that a voluntary guilty plea may not be collaterally attacked, see, e.g., *United States v. Broce, 488 U.S. 563, 569, 102 L. Ed. 2d 927, 109 S. Ct. 757 (1989); Mabry v. Johnson, 467 U.S. 504, 508, 81 L. Ed. 2d 437, 104 S. Ct. 2543 (1984); Tollett v. Henderson, 411 U.S. 258, 267, 36 L. Ed. 2d 235, 93 S. Ct. 1602 (1973),* he argues that the district court never addressed his primary contention: The Government's failure to provide Brady evidence rendered his guilty plea involuntary. Whether a criminal defendant may collaterally attack his guilty plea based on a claimed Brady violation is a legal question that we review de novo. See *United States v. Maybeck, 23 F.3d 888, 891 (4th Cir. 1994).*

In Tollett, the Supreme Court explained that "a guilty plea represents a break in the chain **[*8]** of events which has preceded it in the criminal process." *411 U.S. at 258.* As a result, "when a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea." Id. Instead, once a criminal defendant has pled guilty, collateral review is limited to an examination of "whether the underlying plea was both counseled and voluntary." *Broce, 488 U.S. at 569.*

Several circuits have held that a guilty plea may be deemed involuntary if entered into in the absence of withheld Brady evidence. See, e.g., *Sanchez v. United States, 50 F.3d 1448, 1453 (9th Cir. 1995)* (holding "that a defendant challenging the voluntariness of a guilty plea may assert a Brady claim"); *Miller v. Angliker, 848 F.2d 1312, 1320 (2d Cir. 1988)* (holding that a guilty plea is not voluntary if "entered without knowledge of material information withheld by the prosecution"); *White v. United States, 858 F.2d 416, 422 (8th Cir. 1988)* (holding that the Tollett line of cases "does not **[*9]** preclude a collateral attack upon a guilty plea based on a claimed Brady violation, but habeas relief would clearly be the rare exception"); *Campbell v. Marshall, 769 F.2d 314, 321 (6th Cir. 1985)* (noting that under limited circumstances a guilty plea may be deemed involuntary if entered without knowledge of information withheld by the prosecution). If this Court were to join our sister circuits, McCleary's ability to collaterally attack his guilty plea would turn on whether the Government actually withheld the alleged information and, if so, whether withholding that information violated Brady.

Because the district court did not conduct an evidentiary hearing to determine the truth of McCleary's factual allegations, it is impossible to determine from the record before us whether the Government actually withheld the alleged information. Cf. *Sanchez, 50 F.3d at 1453* (holding that the Government did not possess and was not aware of the information allegedly withheld); *Miller, 848 F.2d at 1321* (noting that "there is no question in this case that the State withheld" information). Nevertheless, for purposes of this appeal we will assume without deciding that the prosecuting **[*10]** attorney knew, prior to McCleary's plea, that Pfennings perjured himself and that Elliott was addicted to Valium. n3 As a result, McCleary's ability to collaterally attack his guilty plea turns on whether withholding the aforementioned evidence violated Brady.

> n3 McCleary also alleged that the Government failed to provide him with exculpatory tape recordings allegedly made by Special Agent Twigg. However, McCleary never identifies when these tapes were made, who is speaking on the tapes, or what exculpatory information the tapes contain. We have previously held that "unsupported, conclusory allegations do not entitle a habeas petitioner to an evidentiary hearing." *Nickerson v. Lee, 971 F.2d 1125, 1136 (4th Cir. 1992)* (conclusory statement that discrimination occurred in selecting the jury was not enough). Because McCleary simply made the conclusory statement that the Government possessed exculpatory tapes, he was not entitled to an evidentiary hearing on this allegation. As a result, we will not assume that the prosecuting attorney knew, prior to McCleary's plea, that exculpatory tape recordings existed.

[*11]

In *Brady v. Maryland, 373 U.S. 83, 10 L. Ed. 2d 215, 83 S. Ct. 1194 (1963),* the Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment." *Id. at 87.* According to the Supreme Court, evidence is "material" if the failure to disclose it "undermines confidence in the outcome of the trial." *United States v. Bagley, 473 U.S. 667, 678, 87 L. Ed. 2d 481, 105 S. Ct. 3375 (1985).* As the definition of materiality suggests, the Supreme Court has never applied Brady, or its progeny, to a guilty plea. In the case of a guilty plea, our sister circuits have concluded that information is "material" if it "would have been controlling in the decision whether to plead." *White 858*

F.2d at 424; see also *Campbell, 769 F.2d at 324* (same); cf. *Sanchez, 50 F.3d at 1454* (holding that information is material if "there is a reasonable probability that but for the failure to disclose the Brady material, the defendant would have refused to plead and would have gone to trial"); *Miller, 848 F.2d at 1322* (same).

After reviewing the record, briefs, and pertinent caselaw, and after hearing oral arguments, we are **[*12]** convinced that none of the allegedly undisclosed information would have altered McCleary's decision to plead guilty. First, we find no merit in McCleary's argument that he would have proceeded to trial had he known that Elliott was addicted to Valium. The fact that Elliott was addicted to Valium was relevant only to his credibility as a witness. McCleary, however, already knew that Elliott's credibility had been assailed at the time he entered his plea of guilty. Elliott admitted at trial that he was a convicted felon and drug dealer, that he failed to file income tax returns, and that he was testifying as a part of a plea agreement with the Government. Knowledge of Elliott's addiction could not have further lessened his credibility with the jury. In short, we conclude that McCleary did not plead guilty because he was unable to attack Elliott's credibility as a witness.

Even if the undisclosed information was essential to a successful attack on Elliott's credibility, Elliott was not the only witness who testified, or was going to testify, about McCleary's participation in selling narcotics. Donald Mackessy testified that in October of 1984 he entered into "a partnership or a joint **[*13]** venture" with McCleary to buy and sell cocaine. (S.J.A. at 68.) According to Mackessy, McCleary would purchase the cocaine in Florida and then send it via Federal Express to Mackessy in Maryland. In Maryland, Mackessy and McCleary cut and packaged the cocaine for further distribution. Over time, the joint venture flourished. As a result, Mackessy testified that McCleary started dealing in kilo quantities and using couriers to bring the cocaine from Florida to Maryland. Even more telling, McCleary knew that his wife, who had already admitted her role in the offense, had agreed to testify about his narcotics activities. As a result, we cannot say that withholding information about Elliott's Valium addiction, which McCleary could have used only to attack Elliott's credibility as a witness, was controlling in McCleary's decision to plead guilty.

Similarly, we find no merit in McCleary's argument that he would have elected to go to trial had he known that Pfennings was a paid agent of the United States Government. Even if McCleary successfully impeached Pfennings' credibility by establishing that he committed perjury, the substance of Pfennings' testimony was corroborated by two independent **[*14]** sources. First, the Government had McCleary's business records, which documented all of his illegal financial transactions. Even more important, Suzanne McCleary was prepared to testify that McCleary frequently transferred money in and out of the off-shore trust accounts managed by Pfennings. As a result, we conclude that withholding information about Pfennings' status as a paid agent of the United States Government did not control McCleary's decision to plead guilty.

We note that McCleary benefited greatly from pleading guilty. McCleary was charged in a fifteen-count indictment. If convicted on all counts, McCleary could have received a maximum of 250 years in prison. n4 As a result of pleading guilty, McCleary received a maximum sentence of 5 years. Although the benefit McCleary received by pleading guilty is not determinative, it certainly does not undermine our conclusion that had the Government provided McCleary with the evidence in question, he would still have pleaded guilty.

n4 Although combining the statutory maximum for each count in the indictment would result in a 250-year sentence, this Court does not have enough information to determine what McCleary's sentence would have been had he been convicted on all counts. Besides the fact that some of the counts in the indictment related to conduct that occurred prior to the enactment of the Sentencing Guidelines, it is not at all clear what his combined offense level would be for those counts covered by the Sentencing Guidelines. In any event, whatever his sentence would have been, it would have been significantly longer than the five-year sentence he received as a result of the plea agreement.

[*15]

In light of the Government's strong case and the prospect of a lengthy sentence if convicted, we do not believe that there is a reasonable probability that McCleary, who was already serving a 25-year state sentence, would have proceeded to trial in this case. Because we find that the information was not material, withholding it did not violate Brady. As a result, we need not, and do not, determine whether a criminal defendant can collaterally attack a guilty plea based on an alleged Brady violation. That determination we leave for another day.

III.

For the foregoing reasons, the judgment of the district court is affirmed.

AFFIRMED

10 of 22 DOCUMENTS

UNITED STATES OF AMERICA, - v. - USAMA BIN LADEN, a/k/a "Usamah Bin-Muhammad Bin-Ladin," a/k/a "Shaykh Usamah Bin-Ladin," a/k/a "Abu Abdullah," a/k/a "Mujahid Shaykh," a/k/a "Hajj," a/k/a "Abdul Hay," a/k/a "al Qaqa," a/k/a "the Director," a/k/a "the Supervisor," a/k/a "the Contractor," MUHAMMAD ATEF, a/k/a "Abu Hafs," a/k/a "Abu Hafs el Masry," a/k/a "Abu Hafs el Masry el Khabir," a/k/a "Taysir," a/k/a "Sheikh Taysir Abdullah," a/k/a "Abu Fatimah," a/k/a "Abu Khadija," AYMAN AL ZAWAHIRI, a/k/a "Abdel Muaz," a/k/a "Dr. Ayman al Zawahiri," a/k/a "the Doctor," a/k/a "Nur," a/k/a "Ustaz," a/k/a "Abu Mohammed," a/k/a "Abu Mohammed Nur al-Deen," MAMDOUH MAHMUD SALIM, a/k/a "Abu Hajer al Iraqi," a/k/a "Abu Hajer," KHALED AL FAWWAZ, a/k/a "Khaled Abdul Rahman Hamad al Fawwaz," a/k/a "Abu Omar," a/k/a "Hamad," ALI MOHAMED, a/k/a "Ali Abdelseoud Mohamed," a/k/a "Abu Omar," a/k/a "Omar," a/k/a "Haydara," a/k/a "Taymour Ali Nasser," a/k/a "Ahmed Bahaa Eldin Mohamed Adam," WADIH EL HAGE, a/k/a "Abdus Sabbur," a/k/a "Abd al Sabbur," a/k/a "Wadia," a/k/a "Abu Abdullah al Lubnani," a/k/a "Norman," a/k/a "Wa'da Norman," a/k/a "the Manager," a/k/a "Tanzanite," IBRAHIM EIDAROUS, a/k/a "Ibrahim Hussein Abdelhadi Eidarous," a/k/a "Daoud," a/k/a "Abu Abdullah," a/k/a "Ibrahim," ADEL ABDEL BARY, a/k/a "Adel Mohammed Abdul Almagid Abdel Bary," a/k/a "Abbas," a/k/a "Abu Dia," a/k/a "Adel," FAZUL ABDULLAH MOHAMMED, a/k/a "Harun," a/k/a "Harun Fazhl," a/k/a "Fazhl Abdullah," a/k/a "Fazhl Khan," MOHAMED SADEEK ODEH, a/k/a "Abu Moath," a/k/a "Noureldine," a/k/a "Marwan," a/k/a "Hydar," a/k/a "Abdullbast Awadah," a/k/a "Abdulbasit Awadh Mbarak Assayid," MOHAMED RASHED DAOUD AL-'OWHALI, a/k/a "Khalid Salim Saleh Bin Rashed," a/k/a "Moath," a/k/a "Abdul Jabbar Ali Abdel-Latif," MUSTAFA MOHAMED FADHIL, a/k/a "Mustafa Ali Elbishy," a/k/a "Hussein," a/k/a "Hussein Ali," a/k/a "Khalid," a/k/a "Abu Jihad," KHALFAN KHAMIS MOHAMED, a/k/a "Khalfan Khamis," AHMED KHALFAN GHAILANI, a/k/a "Fupi," a/k/a "Abubakary Khalfan Ahmed Ghailani," a/k/a "Abubakar Khalfan Ahmed," FAHID MOHAMMED ALLY MSALAM, a/k/a "Fahad M. Ally," SHEIKH AHMED SALIM SWEDAN, a/k/a "Sheikh Bahamadi," a/k/a "Ahmed Ally," Defendants.

S(7) 98 Cr. 1023 (LBS)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

2001 U.S. Dist. LEXIS 719

January 25, 2001, Decided

January 25, 2001, Filed

DISPOSITION:

[*1] Defendant's motion to declare CIPA unconstitutional as applied to him denied.

COUNSEL:

PAUL W. BUTLER, PATRICK J. FITZGERALD, KENNETH M. KARAS, MICHAEL J. GARCIA,

Assistant United States Attorneys, MARY JO WHITE, United States Attorney for the Southern District of New York, New York, New York.

For El-Hage, Defendant: SAM A. SCHMIDT, JOSHUA L. DRATEL, KRISTIAN K. LARSEN, New York, New York.

For Al-'Owhali, Defendant: FREDERICK H. COHN, LAURA GASIOROWSKI, DAVID PRESTON BAUGH, New York, New York.

For Khamis Mohamed, Defendant: JEREMY SCHNEIDER, DAVID STERN, DAVID RUHNKE, New York, New York.

For Odeh, Defendant: ANTHONY L. RICCO, EDWARD D. WILFORD, CARL J. HERMAN, SANDRA A. BABCOCK, New York, New York.

JUDGES:
HON. LEONARD B. SAND, U.S.D.J.

OPINIONBY:
LEONARD B. SAND

OPINION:

MEMORANDUM AND ORDER n1

n1 This classified Memorandum and Order is being filed under seal and will remain under seal until January 18, 2001 unless the Court is advised in writing on or before that date that some portion or all of the Memorandum and Order should remain under seal. The Government is hereby directed to institute proceedings to declassify this Memorandum and Order.

[*2]

SAND, District Judge.

Presently before the Court is Defendant El-Hage's motion to declare the Classified Information Procedures Act ("CIPA"), *18 U.S.C. app. 3* (1980), unconstitutional as applied in this case. Defendants Mamdouh Mahmud Salim and Mohammed Sadeek Odeh join this motion. n2 (Dratel Decl. P 3.) For the reasons set forth below, this motion is denied.

n2 The El-Hage Motion also seeks additional discovery and the Court is uncertain at this time which, if any, of the requests have been consensually resolved or are moot. Counsel for El-Hage is to advise the Court of any discovery requests relating to CIPA which he still wishes to pursue.

ANALYSIS

The Defendant asserts that CIPA is unconstitutional because its application in this case infringes his Sixth and Fifth Amendment rights. More specifically, as a Sixth Amendment matter, he claims that he is being deprived of: (1) the effective assistance of his counsel; (2) the right to confront witnesses; (3) the opportunity to **[*3]** be present at critical proceedings; and (4) the ability to assist in the preparation and presentation of his defense. Under the Fifth Amendment, he argues that he is being denied the following rights: (1) to testify in his own behalf; (2) to present a defense; and (3) to remain silent. These allegations will be evaluated in turn.

I. Background

CIPA was enacted by Congress in 1980 to address the issues which accompany criminal prosecutions involving national security secrets. In particular, the Act was a response to the problem of "graymail" which arose in prosecuting espionage and criminal leak cases. S.Rep. No. 96-823, 96th Cong., 2d Sess. (1980). A defendant is said to "graymail" the government when he threatens to disclose classified information during a trial and the government is forced to choose between tolerating such disclosure or dismissing the prosecution altogether. See *United States v. Pappas, 94 F.3d 795 (2d Cir. 1996)* (discussing "graymail" and CIPA's legislative history); *United States v. Poindexter, 725 F. Supp. 13, 31 (D.D.C. 1989)* (same). In CIPA, Congress established procedures whereby a trial court evaluates before trial **[*4]** the admissibility of the classified information which is at issue.

CIPA mandates that a defendant who "reasonably expects to disclose" classified information must notify the government and the court in advance of trial and must provide a "brief description" of the information. *18 U.S.C. app. 3* § 5. If the defendant fails to provide this notice, the court can preclude the disclosure of the classified information. Id. In addition, CIPA provides that, upon the request of the United States, the court "shall conduct" a hearing (usually in camera) before the start of the trial to "make all determinations concerning the use, relevance, or admissibility of classified information." *18 U.S.C. app. 3* § 6(a). Section 6(c) provides that the United States shall be given the opportunity, before the court authorizes the release of classified information, to propose the substitution of

either a summary of the classified information or a stipulation of the facts sought to be proved by the defendant. If the court denies the government's proposed substitutions, the Attorney General may submit a formal objection to disclosure of the information, at which time **[*5]** the court will forbid the defendant to disclose the information and impose appropriate sanctions on the government (including, in some cases, dismissal of the indictment or selected counts thereof). *18 U.S.C. app. 3* § 6(e). Finally, Section 6(f) provides that if it determines that classified information may be revealed at trial, the court shall "unless the interests of fairness do not so require" order the government to disclose any classified information that it intends to use to rebut the defendant's proffer.

The Court, in a Protective Order dated July 29, 1999 established at P 5 that "no defendant ... shall have access to any classified information involved in this case unless that person shall first have: (a) received the necessary security clearance ..." The Court adopted the Protective Order because of the serious risk that unauthorized disclosure of classified information would jeopardize the ongoing Government investigation into the activities of alleged associates of the Defendants. *United States v. Bin Laden, 58 F. Supp. 2d 113, 121-22 (S.D.N.Y. 1999).* The practical result of that order is that defense counsel have been cleared to **[*6]** review a category of classified documents that they may not share with their clients. (None of the defendants in the case have security clearance.)

The Government provides a long list of the cases which have uniformly upheld the constitutionality of CIPA's procedural framework. (Resp. at 7-8.) However, the Defendant aptly highlights (El-Hage Mot. at 2), and the Government concedes (Resp. at 9-10) that the situation presented here is different from the usual CIPA case. The legislative history of the Act suggests that CIPA was primarily drafted to manage the disclosure of classified information in cases where the defendant was previously in possession of classified information. S.Rep. No. 96-823, 96th Cong., 2d Sess. (1980). Not surprisingly, given this history, the majority of cases employing CIPA procedures have involved those circumstances. See e.g., *Poindexter, 725 F. Supp. 13; United States v. Lee, 90 F. Supp. 2d 1324 (D.N.M. 2000); United States v. North, 708 F. Supp. 389 (D.D.C. 1988); United States v. Collins, 720 F.2d 1195 (11th Cir. 1983).* But see *United States v. Rezaq, 156 F.R.D. 514, 525 (D.D.C. 1994),* **[*7]** vacated in part on other grounds *United States v. Rezaq, 899 F. Supp. 697 (D.D.C. 1995)* (upholding a CIPA-based protective order which withheld classified information from defendant because he was an alleged terrorist and was accused of committing deliberate political crimes against the United States).

The Government claims that this difference -- the fact that the Defendants have had "no prior access to the classified information" -- necessitates that the Court continue to prohibit the disclosure of the classified information to the Defendants. (Resp. at 13.) In addition to its concern that the Defendants "present an ongoing threat to national security," the Government asserts that disclosure to the Defendants of classified information could have a deleterious effect on cooperative law enforcement and intelligence relationships with foreign governments. (Resp. at 12-13.) The Government argues that these concerns justify withholding information that poses a threat to national security from the Defendants.

II. The Defendant's Sixth Amendment Claims

A. The Right to Counsel

The Defendant claims that the nondisclosure provisions of the Protective **[*8]** Order prevent him from consulting with his attorneys to assist in identifying evidence which is relevant, exculpatory or which may serve to impeach a government witness. (El-Hage Mot. at 8.) The Defendant's attorneys explain that because of "the length of the alleged conspiracies, their geographical scope, the language barriers, the myriad names (some very similar) and aliases, and the cultural and ethnic diversity involved," they are severely handicapped by not being able to consult with their client. (Id. at 11.) It is the Defendant's view that the restrictions effect an unconstitutional deprivation of counsel because he cannot consult with his attorney about a "substantial amount of discovery." n3 (Id. at 7.)

> n3 The Government claims that because of its "continuing effort to declassify" discovery materials, "the classified discovery in this case is no longer overwhelmingly voluminous." (Resp. at 2.)

The Supreme Court has established that restrictions on communication between a defendant and his attorney **[*9]** should only be imposed in limited circumstances and should be no more restrictive than necessary to protect the countervailing interests at stake. *Geders v. United States, 425 U.S. 80, 89-91, 47 L. Ed. 2d 592, 96 S. Ct. 1330 (1976)* (holding that defendant was unconstitutionally denied the effective assistance of counsel when he was ordered by the trial judge not to confer with counsel about anything during 17 hour recess between defendant's direct and cross-examination). Cf.

Perry v. Leeke, 488 U.S. 272, 284-85, 102 L. Ed. 2d 624, 109 S. Ct. 594 (1989) (explaining that in situation similar to Geders but where the recess was only for 15 minutes, judge did not violate defendant's rights by forbidding him to confer with counsel).

The Second Circuit has applied these precedents to circumstances similar to those presented in this case. See *Morgan v. Bennett, 204 F.3d 360, 367 (2d Cir. 2000)* (characterizing Geders and Perry as supporting the view that when there is an important need to protect a countervailing interest "a carefully tailored, limited restriction on the defendant's right to consult counsel is permissible"). In **[*10]** Morgan, the defendant and persons associated with him had allegedly threatened a witness and the court ordered the defendant's attorney not to apprise his client of the fact that the witness would be testifying the following day. *Id. at 363.* The Morgan court justified this "gag order" by relying on analogous safety-based limitations which had been approved in other cases. *Id. at 367* (citing to *Roviaro v. United States, 353 U.S. 53, 59-62, 1 L. Ed. 2d 639, 77 S. Ct. 623 (1957)* (allowing an informant's identity to be withheld from the defendant); *Smith v. Illinois, 390 U.S. 129, 131, 19 L. Ed. 2d 956, 88 S. Ct. 748 (1968)* (permitting the government to withhold witnesses' addresses); *United States v. Thai, 29 F.3d 785, 800-01 (2d Cir. 1994)* (allowing jury to be anonymous)). Morgan should not be read too broadly, however. The Second Circuit specifically noted that the "gag order" did not "seem likely" to impair the defense counsel's preparation and highlighted that it did not appear that other restrictions would have been sufficient. *204 F.3d at 368.*

In a similar case decided prior to Morgan, **[*11]** the Second Circuit held that a district court's order (during trial) to the defendant's attorney not to reveal to the defendant that he (the defendant) was the subject of a jury-tampering and perjury investigation was not an unconstitutional infringement of the defendant's right to counsel. *United States v. Padilla, 203 F.3d 156, 158 (2d Cir. 2000).* As in Morgan, the Padilla court highlighted that the restrictions imposed by the district court were "drawn as narrowly as possible" and "did not implicate counsel's representation regarding the crimes charged." *Id. at 160.*

In other circuits, similar restrictions have been upheld. See *United States v. Herrero, 893 F.2d 1512 (7th Cir. 1990)* (finding no infringement of the defendant's right to effective assistance of counsel where the court ordered that defense counsel not reveal the name of the confidential informant to the defendant); *United States v. Truong Dinh Hung, 667 F.2d 1105, 1107 (4th Cir. 1981)* (finding no denial of the Sixth Amendment right to counsel where defense counsel (but not defendants) were permitted to examine documents to assist the court **[*12]** in making Jencks Act determinations); *United States v. Pelton, 578 F.2d 701 (8th Cir. 1978)* (upholding district court's ruling withholding from the defendant tape recordings of her voice in order to protect the identity of cooperating witnesses); *United States v. Anderson, 509 F.2d 724, 730 (9th Cir. 1974)* (permitting access to in camera hearing to defense counsel but not to defendant); *United States v. Singh, 922 F.2d 1169, 1172-73 (5th Cir. 1991)* (same).

It is clear that, usually, a defendant is permitted to review items which have been produced in discovery. See *Truong, 667 F.2d at 1108.* The Court must weigh the interest of the Government in non-disclosure against this presumption. See *Morgan, 204 F.3d at 365* ("The court may not properly restrict the attorney's ability to advise the defendant unless the defendant's right to receive such advice is outweighed by some other important interest."). In other contexts, courts have given similar government interests significant weight in the balancing process. See *United States v. Smith, 780 F.2d 1102, 1108 (4th Cir. 1985)* (explaining **[*13]** that the government has a "substantial interest in protecting sensitive sources and methods of gathering information"); *Rezaq, 156 F.R.D. at 525* (finding that "the need to protect sensitive information clearly outweighs defendant's need to know all of that information personally when his knowledge of it will not contribute to his effective defense"). Cf. *United State v. Yunis, 276 U.S. App. D.C. 1, 867 F.2d 617, 623 (D.C. Cir. 1989)* (holding that government's interest in protecting details about means of intercepting communications outweighed defendant's right to disclosure).

Although the El-Hage's attorneys claim that their task in discerning the relevance and materiality of the classified information is made more difficult by their inability to confer with the Defendant, few harms are specifically identified by defense counsel. El-Hage's counsel raise specific concerns about the contents of the [redacted] and three facsimiles allegedly sent by the Defendant. (El-Hage Mot. at 9.) The latter have now been declassified. (Resp. at 4.) With respect to the former, the Defendant acknowledges that the Government has indicated that it does not plan to **[*14]** use the [redacted] at trial and does not seem to suggest any intention to use the evidence as part of the defense case. (*Id. at 9 n.3.)* If this situation changes, the Court will revisit the question of the need for disclosure of the list to the Defendant. In addition, counsel assert that the defendants "may very well" be in a better position to designate classified material to use in cross-examining [redacted] (if he is to be a government witness). (El-Hage Mot. at 10.) There is no further explanation of why the Defendant might be have a better understanding of

the classified information. The harm to the defendant by that characterization is speculative at best.

Obviously, the Court encourages the Government to continue to prioritize the declassification (through redaction and editing, if necessary) of classified discovery. As appropriate, during a Section 6 hearing (assuming that one is to be scheduled n4), the Court will, in determining the relevance and materiality of classified information, bear in mind that defense counsel have not been able to consult with the Defendant to the extent they would have preferred. At the end of the analysis, however, given the **[*15]** Government's compelling interest in restricting the flow of classified information and in light of the weight of precedent endorsing similar restrictions, the Court rejects the Defendant's claim of an unconstitutional deprivation of counsel. While the Defendant suggests that disclosure might enable him to assist counsel in making decisions about his representation, this hypothetical benefit is insufficient to warrant a finding that the application of CIPA in this case is unconstitutional.

n4 The Court has, on numerous occasions, indicated its availability for a Section 6 hearing. The parties have yet to schedule such a hearing.

B. The Right to Confront Witnesses and Evidence

El-Hage asserts that the Sixth Amendment not only gives him the right to cross-examine witnesses who testify against him, but also that it affords him "the opportunity for *effective* cross-examination." (El-Hage Mot. at 13 (citing to *Delaware v. Van Arsdall, 475 U.S. 673, 678-79, 89 L. Ed. 2d 674, 106 S. Ct. 1431 (1986).)* **[*16]** He argues that the prohibition on disclosure of classified information means that his ability to confront the evidence against him will be impermissibly undercut. In particular, El-Hage's attorneys explain that, at the Section 5 designation stage, the relevance of certain classified material "will likely elude counsel," but that the Defendant might be in a superior position to recognize the potential value of classified information. (El-Hage Mot. at 14.) For the reasons outlined in the previous section, the Court finds that defense counsel merely speculate about the harms that may be suffered by the Defendant. The suggestion that the Defendant "might" contribute to the predominantly legal process of designating relevant evidence is not sufficient to warrant a finding that CIPA is being applied to deprive the Defendant of his constitutional right to confront witnesses. See infra Section II.C. (discussing defendant's right to be present at pretrial hearings concerning the resolution of legal questions).

The Defendant also asserts that Sections 5(a) and 6 impermissibly require that the Defendant "preview" his cross-examination to the Government. (El-Hage Mot. at 15.) According to **[*17]** El-Hage, such a preview would "most certainly result in 'significant diminution' of the effectiveness of that cross-examination." (Id. (citing to *United States v. Poindexter, 698 F. Supp. 316, 320-21 (D.D.C. 1988)).)* The Defendant notes that the Government is subjected to no such disclosure requirement.

The Government correctly notes that "each court considering these arguments in the CIPA context has rejected them." (Resp. at 18-19.) See *Lee, 90 F. Supp. 2d at 1328* (upholding the constitutionality of CIPA and explaining that "the Confrontation Clause does not guarantee the right to undiminished surprise with respect to cross-examination of prosecutorial witnesses"); *Poindexter, 725 F. Supp. at 34-35* (same); *United States v. Ivy, 1993 U.S. Dist. LEXIS 13572,* *21, *1993 WL 316215,* *7 (E.D.Pa.) ("CIPA does not ... deprive Ivy of the opportunity to confront and question the government's witnesses at trial."). These cases emphasize that CIPA does not require that a defendant reveal his or her trial strategy, but only mandates that the defendant identify whatever classified information he plans to use. See *Lee, 90 F. Supp. 2d at 1328; Ivy, 1993 WL 316215,* **[*18]** *8; *United States v. Wilson, 571 F. Supp. 1422, 1427 (S.D.N.Y. 1983)* (explaining that the statute requires only a "'brief description of the classified information'" to be used).

In addition, despite the Defendant's assertion to the contrary, numerous courts have held that CIPA's burdens are not one-sided. See *United States v. Collins, 720 F.2d 1195, 1197 (11th Cir. 1983)* (reviewing government's disclosure obligations under CIPA); *Poindexter, 725 F. Supp. at 32* (rejecting claim that CIPA's burdens are one-sided); Ivy, 1993 316215 at *5 (characterizing CIPA's burdens as "carefully balanced" between the government and the defendant). Thus, the Court rejects the Defendant's attempt to analogize his burdens under CIPA to the situation presented in *Wardius v. Oregon, 412 U.S. 470, 37 L. Ed. 2d 82, 93 S. Ct. 2208 (1973).*

The Defendant requests that the Court permit him to submit his "rationale for the projected use of designated classified material" to the Court ex parte as was done in Poindexter. (Reply at 14.) See *United States v. Poindexter, 698 F. Supp. 316, 320 (D.D.C. 1988)* (permitting an **[*19]** ex parte submission in order to prevent the defendant from having to disclose his trial strategy to the government). The Government argues that an ex parte submission by the defendants in this case would be inappropriate because it would "clearly frustrate CIPA's purpose in identifying for the Government the national security 'cost' of going forward

with particular charges against particular defendants." n5 (Response at 20 n. 8.) The Court does not accept this proposition. The Government will be provided with the Section 5 notice which shall, in providing the "brief description" required by the statute, meet the standard for specificity set forth in *United States v. Collins, 720 F.2d 1195, 1199 (11th Cir. 1983))*. The Court will then permit the Defendant to submit his explanation of the proposed use of the information ex parte. See *Poindexter, 698 F. Supp. at 320* (explaining that the framers of CIPA "expected the trial judge 'to fashion creative and fair solutions' for classified information problems").

n5 The Government suggests that the highly unusual circumstances underlying the Poindexter decision make it a poor analog to the instant case. (Resp. at 20 n.8.) While the situation in Poindexter was significantly different, the general principles articulated by the court are applicable. See *Poindexter, 698 F. Supp. at 320* ("In any case involving classified information the defendant should not stand in a worse position because of such information than he would have if there were no such statutory procedures.").

[*20]

C. Right to be Present at Critical Proceedings

The Defendant asserts that he has a Sixth Amendment right to be present at a CIPA Section 6 hearing (and during the Section 5 designation process) because these are critical proceedings or critical stages of the trial. n6 (El-Hage Mot. at 17-18.) See *Snyder v. Massachusetts, 291 U.S. 97, 105-06, 78 L. Ed. 674, 54 S. Ct. 330 (1934)* ("In a prosecution for a felony the defendant has the privilege ... to be present in his own person whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge."). The test established by the Supreme Court for determining whether the defendant's absence from a pretrial proceeding is violative of the Sixth Amendment, in particular the Confrontation Clause, is whether the defendant's exclusion "interferes with his opportunity for effective cross-examination." *Kentucky v. Stincer, 482 U.S. 730, 740, 96 L. Ed. 2d 631, 107 S. Ct. 2658 (1987)* (upholding the defendant's exclusion from a competency hearing (that his attorney attended)). See also *Padilla, 203 F.3d at 160* (finding that defendant's **[*21]** exclusion from a pretrial proceeding was constitutional); *United States v. Bell, 464 F.2d 667, 670 (2d Cir. 1972)* (excluding the defendant during an airline ticket agent's description of the "air hijacker profile"). In all three cases, the courts emphasized that the subject matter of the pretrial proceedings was not directly related to the subject matter of the trial. See *Stincer, 482 U.S. at 741; Padilla, 203 F.3d at 160; Bell, 464 F.2d at 671*. Relying on these cases, the Defendant argues that he should not be excluded from a Section 6 hearing (or from the Section 5 designation process) because he could contribute to his counsel's understanding of the materials being reviewed. (El-Hage Mot. at 17-18.)

n6 Because the parties have yet to request a Section 6 hearing, this issue may be moot.

According to the Government, the Section 6 hearing, which will determine the relevance and admissibility of certain classified information, will address questions **[*22]** of law and not questions of fact and, therefore, does not require the Defendant's presence. (Resp. at 21 (citing Fed. R. Crim. P. 43(c)(3) ("A defendant need not be present ... when the proceeding involves only a conference or hearing upon a question of law.")).) The Ninth Circuit has ruled that the questions resolved during a CIPA hearing regarding the protection of classified information are questions of law which may be resolved outside the presence of the defendant. *United States v. Klimavicius-Viloria, 144 F.3d 1249, 1261-62 (9th Cir. 1998)*. See also *United States v. Cardoen, 898 F. Supp. 1563, 1571-72 (S.D. Fl. 1994)* (holding that court rulings at a Section 6 hearing are not "factual questions that are relevant to the determination of guilt or innocence"). Cf. *United States v. Singh, 922 F.2d 1169, 1172-73 (5th Cir. 1991)* (finding that in camera hearing to ascertain whether to disclose the identity of a confidential informant involved resolution of the legal question of the materiality of her testimony and concluding that exclusion of defendant from the hearing (which his attorney was permitted to attend) did not qualify as **[*23]** a breach of the Confrontation Clause). The Court adopts these precedents and holds that the Defendant's exclusion from the hearing, should one be held, is not unconstitutional.

D. The Right to Assist in the Preparation and Presentation of his Defense

Based on the above outlined arguments and in reliance on *Faretta v. California, 422 U.S. 806, 819, 45 L. Ed. 2d 562, 95 S. Ct. 2525 (1975)*, El-Hage argues that he has a personal right to make his defense. According to the Defendant, he is being "deprived of his right to assist in the preparation and presentation of his defense if he is barred from participating in the Section 5 designation process, as well as from being present at and

participating in subsequent CIPA proceedings." (El-Hage Mot. at 20.)

The Defendant is correct that Faretta speaks, at length, about the right "to make one's own defense personally." *422 U.S. at 819* ("It is the accused, not counsel, who must be 'informed of the nature and cause of the accusation,' who must be 'confronted with the witnesses against him,' and who must be accorded 'compulsory process for obtaining witnesses in his favor.'"). These characterizations, **[*24]** however, are offered by the Supreme Court in the context of a defendant who sought to represent himself. See id. Faretta's protection of the right of the accused to represent himself does not extend to the holding that the Defendant suggests. The Faretta Court specifically acknowledges that the protections afforded the defendant are different when he or she has acquiesced to an attorney's representation. *Id. at 820-21.* Because the Court has already established that the limited restrictions on communication between the Defendant and his attorney are justified, this assertion is rejected.

III. The Defendant's Fifth Amendment Claims

A. The Right to Testify

The defendant claims that he will "effectively" be denied his Fifth Amendment right to testify in this case because his attorneys will be unable to prepare him adequately for both his direct testimony and the Government's cross examination. (El-Hage Mot. at 21.) While it is clear that El-Hage has the right to testify, see *Rock v. Arkansas, 483 U.S. 44, 49, 97 L. Ed. 2d 37, 107 S. Ct. 2704 (1987),* it is also true that this right "'may, in appropriate cases, bow to accommodate **[*25]** other legitimate interests in the criminal trial process.'" *Id. at 55* (quoting from *Chambers v. Mississippi, 410 U.S. 284, 295, 35 L. Ed. 2d 297, 93 S. Ct. 1038 (1973)).* In addition, given the fact that the Defendant's attorneys have seen the classified information at issue, it is not clear why El-Hage will actually suffer any such detriment.

B. The Right to Present a Defense

The Defendant claims that, as applied in this case, CIPA will impermissibly infringe upon his due process right to present a defense. (El-Hage Mot. at 22.) See *California v. Trombetta, 467 U.S. 479, 485, 81 L. Ed. 2d 413, 104 S. Ct. 2528 (1984)* ("To safeguard [the right to present a defense], the Court has developed 'what might loosely be called the area of constitutionally guaranteed access to evidence.'"). El-Hage's attorneys claim that their investigations are limited both by the prohibition on communication with their client and by the prohibition on communication with others outside the case. (Id. at 22-23.) For the reasons outlined in previous sections of this analysis, the Court is not persuaded that the limited restriction on El-Hage's **[*26]** communications with his counsel will have a detrimental impact on the Defendant's right to present a defense.

The Defendant again asserts that this is a burden that CIPA unfairly imposes only on the defense. As outlined above, the Court does not view the burdens imposed by CIPA as one-sided. See supra Section II.B.

C. The Right to Remain Silent

Finally, the Defendant alleges that CIPA's pretrial notice requirements violate his Fifth Amendment right to remain silent. (El-Hage Mot. at 25.) The Defendant relies on *Brooks v. Tennessee, 406 U.S. 605, 32 L. Ed. 2d 358, 92 S. Ct. 1891 (1972),* for the proposition that the requirement that the Defendant "provide extensive pretrial disclosure to the government in order to preserve his right to testify" is unconstitutional. In Brooks, the Supreme Court held that a Tennessee statute which required the defendant to testify at the outset of the defense case or not at all violated the defendant's constitutional right to remain silent. *Id. at 610-11.*

Previous courts have considered and rejected the attempt to apply Brooks in the CIPA context. See *Poindexter, 725 F. Supp. at 32* **[*27]** (rejecting defendant's argument that Section 5 of CIPA violated his right to remain silent because the statute merely requires that the defendant provide a "general disclosure as to what classified information the defense expects to use at the trial"); *Lee, 90 F. Supp. 2d at 1327* (same). Cf. *United States v. Wilson, 750 F.2d 7, 9-10 (2d Cir. 1984)* (finding "no constitutional infirmity" in CIPA's pretrial notification requirements and emphasizing that a defendant is only required to notify the court and the prosecutor of classified information that "'he reasonably expects to disclose'"). Some courts, in resolving this question, have equated CIPA's requirements with other required pretrial disclosures such as the intention to offer an alibi defense, an insanity defense, a public authority defense or certain medical tests or tangible objects. See *Poindexter, 725 F. Supp. at 33* (citing to Fed. R. Crim. Pro. 12.1, 12.2, 12.3 and 16); *Lee, 90 F. Supp. 2d at 1327* (same). These other pretrial requirements have been upheld as constitutional by the Supreme Court. See e.g. *Williams v. Florida, 399 U.S. 78, 26 L. Ed. 2d 446, 90 S. Ct. 1893 (1970);* **[*28]** *Taylor v. Illinois, 484 U.S. 400, 98 L. Ed. 2d 798, 108 S. Ct. 646 (1988).* Given these precedents, the Court does not accept the defendant's argument that the application of CIPA's notice provisions violates his right to remain silent.

CONCLUSION

For the foregoing reasons, the Defendant's motion to declare CIPA unconstitutional as applied to him is denied.

SO ORDERED.

New York, New York

Leonard B. Sand

U.S.D.J.

1/25/01